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In the

Supreme Court of the United States

October Term, 1979

No. 79-931

LLOYD L. HAYES, HAYES, INC.,
PARK PLAZA TWIN THEATRES, INC.
AND MID-COUNTY ENTERPRISES, INC.,
Petitioners,

v.

T. G. SOLOMON, GULF STATES THEATRES, INC.,
GULF STATES THEATRES OF TEXAS, INC.
AND FUQUA INDUSTRIES, INC.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' REPLY MEMORANDUM

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Respondents have made no serious attempt to respond to petitioners' showing that a writ of certiorari should be granted in this case. Petitioners have shown that this case presents two questions of law of general public importance: first, whether injuries suffered as the result of a competitor's violations of the antitrust laws committed for the specific

purpose of causing those injuries may, nonetheless, be held not to be "antitrust injuries," and second, whether this Court's principal decisions regarding the standard to be applied by a federal court under the Seventh Amendment in reviewing determinations of fact by a jury are not applicable to antitrust cases. Petitioners have shown that the decision of the Court of Appeals for the Fifth Circuit on each of these questions is almost surely incorrect and there is a very serious disagreement among the circuits on the second question. Instead of seriously attempting to refute this showing, respondents rely primarily on the surprising assertion that the Court of Appeals' decisions on these basic questions are irrelevant to the result it reached in this case. The purpose of this very brief reply is to show that these assertions are patently untenable.

Respondents in effect attempt to wish this case away by representing that petitioners have not objected to the Court of Appeals' rejection of the findings of fact made by the jury and substitution of its own findings. Thus, respondents repeatedly assert, for example, that "petitioners do not challenge the Court of Appeal's" factual findings (Br. in Opp. 1), that petitioners "do not quarrel with any fact set out in the exhaustive review of the evidence" by the Court of Appeals (*id.* 2), and that the "facts" found by the Court of Appeals "are not challenged" by petitioners (*id.* 5). Petitioners, of course, have challenged the Court of Appeals' substitution of its own factual findings for those made by the jury—indeed, petitioners would not otherwise now be before this Court. The petition asserts, for example, that the evidence introduced at the trial, "at least when viewed as it should have been but was not by the Court of Appeals, in the light most favorable to petitioners," (Pet. 5) sufficiently supports the factual findings made by the jury and

rejected by the Court of Appeals, and that "the evidence in the record of this case supports the jury verdict in [petitioners'] favor regardless of the standard of review applied." (Pet. 21). Instead of simply asking this Court for a *de novo* review of the evidence and the Court of Appeals' factual findings—generally an insufficient ground for a petition for certiorari—petitioners have shown that the Court of Appeals would not and could not have rejected the jury's factual findings except for its erroneous rulings on the basic questions of law presented and that these questions are of general public importance. Respondents' only answer is, in effect, that the Court of Appeals' erroneous rulings on these basic questions should be ignored, and that this Court should now decide whether the Court of Appeals would have reached the same ultimate result in this case even if it had decided these questions correctly!

Thus, respondents devote a single page of their brief to petitioners' showing that the Court of Appeals erred in holding that this Court's decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), precludes petitioners from recovering under the antitrust laws for injuries caused by their competitors' (respondents') antitrust violations directed to causing precisely the competitive injuries complained of. Respondents argue that petitioners' "*Brunswick* argument need not be addressed by the Court" because, respondents again assert, "the ground for the Court of Appeals's decision is not challenged here." (Br. in Opp. 8). Respondents are correct that petitioners "do not dispute . . . that preparedness must be shown" to establish some of the antitrust claims involved in this case, but respondents ignore the fact that the jury found that preparedness *was* shown and the further fact that the jury's finding could not have been rejected by the Court of Appeals except for

its erroneous rulings on what constitutes a valid antitrust claim and on the proper standard for federal court review of jury verdicts.[1]

Similarly, respondents do not in fact dispute that the Fifth Circuit does not apply or purport to apply to jury verdicts in antitrust cases the standard of review required by the Seventh Amendment as explicated by this Court in a series of F.E.L.A. cases, that the Fifth Circuit's standard is less favorable to jury verdicts, that the Fifth Circuit's position on this question is incorrect, or that there is nationwide disagreement among the circuits on this question. Incredibly, respondents contend, instead, that the question of the proper standard for review of jury verdicts is "irrelevant" and that "the same result would have followed" in this case even if the Fifth Circuit had applied the correct standard (Br. in Opp. 13). The short answer to respondents' contention is that the Fifth Circuit (and other courts of appeals) certainly do not consider that the question of the correct standard of review is irrelevant; the standard applied by the Fifth Circuit in this case was adopted only after full consideration of the issue

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[1] Respondents do weakly assert, in addition, that "the Court of Appeals's discussion of antitrust injury . . . was in any event correct" (Br. in Opp. 1) and "unexceptionable" (*id.* 8) because not all of the "profits lost or other injuries suffered" by petitioners (*ibid.*) as a result of respondents' antitrust violations were "because of foreclosure of opportunities to exhibit motion pictures." (*Ibid.*). Respondents are plainly mistaken, however, in apparently believing that not all injuries directly caused to a competitor's business or property by antitrust violations directed to eliminating such competition are recoverable under the antitrust laws. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114, at *n.* 9. (1969). Even if respondents were not mistaken, their argument would go only to the proper measure of damages and not to the issue — the issue involved here — of whether the injured competitor has an antitrust claim. *Id.*

in an *en banc* decision by a divided court that overruled an earlier contrary decision (Pet. 21-23). One cannot be certain, of course, as to what "result would have followed" in this case if the Fifth Circuit had applied the correct standard, but it is difficult to believe that the jury verdict in petitioners' favor would have been cast aside if the requirements of the Seventh Amendment as explicated by this Court had been followed.

For the reasons stated above, as well as those stated in the Petition for Certiorari, Petitioners pray that the Petition for Certiorari be granted.

Respectfully submitted,

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